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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

GUY BRAIN, et al.
Petitioners

vs.

ROADWAY EXPRESS, INC., et al.
Respondents

PETITION FOR A WRIT OF CERTIORARI
To The United States Court of Appeals
For The Sixth Circuit

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SUPREME COURT of the UNITED STATES

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For the Sixth Circuit

To the Honorable Chief Justice and the Honorable Associate Justices of the Supreme Court of the United States:

Petitioners Guy Brain, et. al. pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered on September 23, 1983 Case No. 82-3078 on the docket of that Court.

QUESTIONS PRESENTED FOR REVIEW

I. Should this Court's decision in Del Costello v International Brotherhood of Teamsters, 462 US ____, 103 SCt. 2281 (1983) be given prospective or retroactive effect?

II. Should the applicable statute of limitations period be tolled while the employees attempted to exhaust their internal union remedies prior to this Court's decision in Clayton v Automobile

III. Should a grievance adjustment which is not made final under the terms of the collective bargaining agreement or a grievance decision rendered by a grievance mechanism lacking in contractual jurisdiction be accorded application of the doctrine of arbitral finality?

PARTIES TO THE PROCEEDING

The parties to this proceeding are Petitioners: Guy W. Brain, Joseph Vasko, Dow Dempsey, Donald Bassett, Tom Maki, George Aloshen, George Scina, Charles Kalvas, William Whitesides, Paul W. Matty, Leslie Montgomery, Randolph Fuller, Frank Selzer, Bryan McGown, Neil Kinser, Mackinley Capers, George Bobish, and Carmel White (who will hereinafter be referred to collectively as "Petitioners"); and Respondents: Roadway Express, Inc. (hereinafter, "Roadway"), Truck Drivers Local 407, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter, "Local 407"), Joint Council 41, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter, "Joint Council 41"), Teamsters National Freight, Industry Negotiating Committee (hereinafter "National Committee"), Freight Division Central Conference of Teamsters (hereinafter "C.C.T.") and Joint State Cartage Committee (hereinafter, "Joint Committee"). (The last five (5) respondents will be referred to collectively as the "Union" or "Union Respondents".)

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OPINIONS BELOW

The order of the United States Court of Appeals for the Sixth Circuit is reproduced at Appendix A. The Memorandum Opinion of the United States District Court is reproduced at Appendix B. The Order of the United States District Court is reproduced at Appendix C.

JURISDICTIONAL GROUNDS

The decision sought to be reviewed is that of the United States Court of Appeals for the Sixth Circuit, filed September 23, 1983. No rehearing from the Court of Appeals nor extension of time in which to file this Petition have been sought.

The statutory provisions conferring jurisdiction on this Court to review the decision are 28 USC Sec. 1254(1) and 28 USC Sec 2101 (c).

STATUTES WHICH THE CASE INVOLVES

29 USC Sec. 185, (Sec. 301 L.M.R.A.) Suits by and against labor organizations

(a) Venue, amount, and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent - Entity for purposes of suit--Enforcement of money judgments. Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction. For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdic-

tion of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of Process. The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency. For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

29 U.S.C. Sec. 160(b) [Sec 10(b), NLRA]:

...(b) Complaint and notice of hearing - Answer - Court rules of evidence inapplicable. Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less that five days after the serving of said complaint: Provided, That no complaint shall issue

based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934.

STATEMENT OF THE CASE

Petitioners were all dockworkers employed at the Cleveland Terminal of Respondent, Roadway during 1978 and 1979. All were also members of Respondent, Local 407 and the International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America. (Hereinafter, "I. B. T.") Respondents, National Committee and C.C.T., as well as Roadway and Local 407, were signatories to the National Master Freight Agreement and the Central States Area Local Cartage Supplemental Agreement (hereinafter the "NMFA" or the "contract"). This is the collective bargaining agreement under which Petitioners were employed.

Joint Council 41, is a labor organization created under the I.B.T. Constitution which exercises authority over member Local Unions, such as Local 407.

The Joint Committee, is a decision-making entity created by the grievance machinery of the NMFA.[1]

In the spring of 1978, Roadway began to transfer work from its Cleveland terminal to other terminals, particularly its new Copley Terminal. Roadway partially closed the Cleveland Terminal. Prior to transferring said work, Roadway did not seek or obtain the approval of the appropriate change of operations committee as required by Article 8, Sec. 6 of the NMFA.

Pursuant to Article 45 Section 1 of the NMFA, grievances were filed challenging Roadway's transfer of work in May of 1978. The Joint Local Committee deadlocked on these grievances (i.e. the

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[1] Joint Committees are the major decision-making mechanism of the NMFA grievance machinery. They are made up of equal numbers of labor and management representatives. They make decisions, on grievances brought before them by majority vote.

second step of grievance procedure). Subsequently, the Joint State Committee deadlocked on the same grievances, (i.e. the third step of grievance procedure).

The grievances were then scheduled to be heard on September 22, 1978 by the Joint Area Committee, (i.e. the fourth step of the grievance procedure). However, prior to actually reaching that level, the grievances were withdrawn by the Union.

Thereafter, the transfer of work by Roadway continued and intensified. As a result, Cleveland dockworkers, including Petitioners, began to be laid off. A second set of grievances were filed by the Union. They were again deadlocked by the Joint Local Committee. On July 19, 1979, the Joint State Committee decided the grievances in Roadway's favor.

On November 15, 1979, Petitioners filed internal union charges against four

(4) of their Union officials essentially alleging breaches of the duty of fair representation. Petitioners conscientiously processed those internal union charges to the highest level of the appellate procedures.

Petitioners filed suit on December 18, 1980 pursuant to Sec. 301 of the Labor Management Relations Act (LMRA, 29 USC Sec 185), against all six (6) Respondents. Petitioners alleged that Roadway breached the relevant collective bargaining agreement. Petitioners also alleged that the Union Respondents failed to represent them fairly and/or colluded with the other Respondents to deprive them of their rights under the NMFA. Petitioners sought restoration of their seniority benefits, back wages, fringe benefits, and monetary relief for emotional stress as relief against Roadway. Petitioners sought punitive damages, rea-

sonable attorneys fees and costs as relief against the Union Respondents.

On August 17, 1981, all six (6) Respondents filed Motions to Dismiss and/or for Summary Judgment. All such motions alleged that Petitioners' action was time-barred. Petitioners opposed said motions.

The District Court rendered a Memorandum of Opinion on December 3, 1981 and issued an order pursuant thereto, which granted all Respondents' Motions for Summary Judgment and dismissed Petitioners' case.

On September 23, 1983, the United States Court of Appeals for the Sixth Circuit issued its order and opinion affirming the District Court's dismissal. It is this decision which Petitioners now seek to bring before this Honorable Court for its review.

ARGUMENT: REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I. The Court of Appeals Incorrecty Applied the Rule of Del Costello Retroactively to This Case.

In the last few years this Court has issued three decisions which impact upon the question of what is the appropriate limitations period to apply to a Vaca suit [2] brought pursuant to Section 301 of the Labor Management Relations Act, (L.M.R.A., 29 USC Sec. 185). The first of these cases was United Parcel Services v. Mitchell 457 US 56, 101 S Ct. 1559 (1981). The second was Clayton v Automobile Workers, 451 US 679, (1981).[3] The third was Del Costello vs. International Brotherhood of Teamsters, 462 US ___, 103 S.Ct 2281 (1983).

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[2] Vaca v Sipes, 386 U.S. 171 (1967)

[3] The impact of Clayton is less direct but of particular significance in this case. It is discussed more fully at pp 18 to 24 of this petition.

In Mitchell this Court determined the statute of limitations that is most analogous for a Vaca claim against an employer is the state statute of limitations governing the vacation of arbitration awards. Mitchell led to a multitude of District and Appellate Court decisions on the various questions it left unanswered. [4]

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[4] See e.g. Del Costello v International Brotherhood of Teamsters 679 F2d 879 (4th Circ, 1982); Flowers v. Local 2602, USWA, 621 F2d 87 (2d Circ, 1982); Newton v. I.U.E., 684 F. 2d 401 (6th Cir., 1982); Lake v Martin Marietta Corp., 538 F. Supp. 725 (M.D. Fla., 1982); Dent v. U.S. Postal Service, 538 F.Supp. 1079 (S.D., Fla., 1982);King v. Corn Products, 538 F.Supp. 569 (N.D., Ill., 1982); Wilkey v Meijer, Inc. 550 F.Supp 411 (W.D. Mich, 1982); Christianson v Pioneer Sand & Gravel Co. 681 F.2d 577 (9th Cir., 1982); Washington v Northland Marine Co. Inc., 681 F.2d 582 (9th Cir., 1982); Edwards v U.S. Postal Service, 678 F.2d 1276, (5th Circ., 1982); Talley v. U.S. Postal Service, 532 F.Supp 786 (D. Minn., 1982); Engelsberg v Transcom Lines, Inc., 530 F.Supp 628 (W.D. Wash, 1982); McFarland v I.B.T., 535 F.Supp 970 (N.D. Tex. 1982); Hand v International Chemical Workers Union 681 F.2d 1308 (11th Circ., 1982); Badon vs. G.M.C. 679 F.2d 936 (6th Cir. 1982); Hardesty v Essex Group, Inc., 550

[continued on next page bottom]

These unanswered questions included the appropriateness of applying Mitchell retroactively. These decisions were varied in their results. Certiorari was granted in Del Costello on several of the issues which Mitchell left unanswered including retroactivity. [5]

[4 cont'd] F.Supp 752 (N.D. Ind, 1982); Larry v Penn Truck Aids __F.Supp__, 112 LRRM 2949 (E.D. Pa., 1982); Lawson v. Truck Drivers Local Union 100 698 F.2d 250 (6th Circ, 1983); Leech v U.S. Postal Service 698 F2d 250 (6th Circ, 1983); Newton v Local 801 I.U.E. 684 F.2d 401 (6th Circ, 1982); Paree v United Auto Workers Local 5, __F. Supp__, 113 LRRM 2080 (N.D. Ind, 1982); Pitts v Frito-Lay, Inc. 700 F.2d 330 (6th Cir., 1983); D'Andrea v American Postal Workers Union, 700 F2d 335, (6th Circ, 1982); LaMare v Inland Div of General Motors Corp., 550 F.Supp. 1005 (S.D. OH, 1982); Maget vs Kaiser, 546 F.Supp 486 (S.D. OH, 1982); Bigbie v Local 142, I.B.T., 530 F. Supp. 402 (N.D. Ill., 1981); Carpenters Local 1020 v FMC Corp., 658 F 2d 1285 (9th Circ, 1981); Collins v American Freight System Inc., 559 F.Supp 1032 (W.D. Md., 1983); Edie v. Brundage Co. 546 F Supp 837 (W.D. Mich, 1982); Hudson v Teamsters Local Union No. 957, 536 F Supp. 1138 (S.D., Oh, 1982).

[5] The other issues presented in Del Costello were: (1) Is state arbitral

[continued on next page bottom]

Del Costello did not specifically address the question of whether Mitchell should be given prospective or retroactive application. Instead, the Court found that the Mitchell rule was no longer viable because:

> ...state limitations periods for vacating arbitration awards fail to provide an aggrieved employee with a satisfactory opportunity to vindicate his rights under Sec 301 and the fair representation doctrine.
> Del Costello, supra at 2284.

On that basis, the Court looked beyond the Mitchell rationale and applied the statute of limitations period of Sec. 10(b) of N.L.R.A. [29 USC Sec.160(b)] The Court adopted the reasoning of Justice Stewart in his concurring opinion in Mitchell.

[5 cont'd] limitations period explicated in United Parcel Service v. Mitchell applicable to both company and union when fair representation suit is filed against both of them? (2) Should limitations period for bringing fair representation suits be borrowed from National Labor Relations Act rather than state statutes for vacation arbitration awards?

In the instant case, the Court of Appeals applied Del Costello retroactively without any discussion as to whether or not retroactive application was appropriate. (See Appendix A-1 to A-11) Thus, this case is in conflict with LaBond, supra and Edwards, supra. The Federal Courts of Appeals are in conflict on this question. Further, various Courts of Appeals have now decided important questions of federal law which have not been but should be settled by this Court. The Court of Appeals decision also seems to be in conflict with previous decisions of this Court. Therefore, review on certiorari would be appropriate in this instance. (See Rule 17.1 of the Rules of the Supreme Court.)

[6 con't] and Organ v Int'l Chemical Workers Union 564 F.Supp. 1262 N.D. Miss., 1983 (discussing retroactivity of Del Costello without resolution).

In the instant case, the Court of Appeals applied Del Costello retroactively without any discussion as to whether or not retroactive application was appropriate. (See Appendix A-1 to A-11) Thus, this case is in conflict with LaBond, supra and Edwards, supra. The Federal Courts of Appeals are in conflict on this question. Further, various Courts of Appeals have now decided important questions of federal law which have not been but should be settled by this Court. The Court of Appeals decision also seems to be in conflict with previous decisions of this Court. Therefore, review on certiorari would be appropriate in this instance. (See Rule 17.1 of the Rules of the Supreme Court.)

(6 con't) and Organ v Int'l Chemical Workers Union 564 F.Supp. 1262 N.D. Miss., 1983 (discussing retroactivity of Del Costello without resolution).

The landmark case on the subject of civil retroactivity is, of course, Chevron Oil Co. vs Huson, 404 US 97 (1971). In terms of retroactivity, the cited case is factually similar to the instant one.

In Chevron, this Court pronounced a three part test to determine when a decision should be given prospective only application:

> In our cases dealing with the non-retroactivity question, we have generally considered three separate factors.
>
> First, the decision to be applied non-retroactively must establish a new principle of law, either by overruling a clear past precedent on which litigant may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed.
>
> Second, it has been stressed that "we must...weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application, for "(w)here a decision of this Court could produce substantial inequitable results if applied retroactively,

there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity."

> Chevron, supra, at 106-107, (citations omitted, emph. added)

Each of these factors weigh heavily in Petitioners' favor.

There can be little question but that Del Costello established a new principle of law overruling clear past precedent.[7]

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[7] The overwhelming weight of authority, in the Sixth Circuit and elsewhere at the time Petitioners filed suit, suggested that a contract or torts statute of limitations was the proper statute to apply. See e.g. Int'l Union, U.A.W. v. Hoosier Cardinal Corp., 383 US 697 (1966); Gallagher v Chrysler Corp, 613 F2d 167 (6th Circ, 1980); Smart v Ellis, 580 F2d 215 (6th Cir 1978), cert.den 440 US 958; Gray v Int'l Assn., 416 F.2d 313 (6th Cir, 1969); De Vries v Interstate, 501 F.Supp 105, (N.D. Oh., 1977) aff'd 620 F2d 302 (6th Cir., 1980); Dill v Wood, Shovel & Tool Co. __F.Supp__, 80 LRRM 2445 (S.D. Oh., 1972); Relifford v Eastern Coal Corp., 260 F.2d 447 (6th Cir., 1958) cert den. 359 US 958; Faisetti v United Mine Workers, 355 F.2d 658 (3rd Cir. 1966); Buckholtz v Swift & Co. 62 FRD 581 (D. Minn., 1973); Sandoval v. Armour Co. 429 F2d 1234 (2nd Cir., 1970) cert den. 401 US 1009; Carpenters & Millwrights Hlth. Ben. Trust Fund v Domestic Insulation,

[continued on next page bottom]

This is particularly so in the Sixth Circuit where the Court's three most recent decisions (prior to Mitchell and DelCostello) applied state tort statute

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[7 con't] 387 F.Supp 144 (D.Colo, 1975); Butler v Int'l Brotherhood of Teamsters, etc., 514 F2d 442 (8th Cir., 1975) cert den. 423 US 924; Mikel vs. Wisconsin Bridge & Iron Co. 359 F.Supp. 444 (D. Wis., 1973); Warren v Int'l Brotherhood of Teamsters, Etc. 544 F.2d 334 (8th Cir., 1976); Grant v Mulvihill Bros. Motor Service, Inc., 428 F.Supp 45 (D. Ill., 1976); Allen v Amalgamated Transit Union, 415 F.Supp. 662 (Ed. Mo., 1976); aff'd. in pertinent part and remanded in part, 554 F.2d 876 (8th Cir., 1976); Kaufman & Broad Home Systems, Inc. v Int'l Brother-hood of Fireman & Oilers, 607 F. 2d 1104 (5th Cir, 1979; Robbins v Newman, 481 F.Supp. 1241 (E.D. Mo., 1979); Allen v McWilliams Electrical Co. 494 F.Supp 43 (N.D. Ill., 1980); Coleman v Kroger Co. 399 F.Supp 724 (D.Va., 1975); Sanderson v Ford Motor Co. 483 F2d 102 (5th Cir., 1973); DeArroyo v Sindicato de Trabaladores Packinghouse, 425 F. 2d 261 (1st Cir, 1970) cert.den. 400 US 877, reh.den 400 US 953, cert.den, 410 US 877, reh. den. 410 US 926; Price v Southern Pacific Trnsprtn. Co, 586 F2d 570 (9th Cir., 1978). Of the three Chevron factors, the first is the "most fundamental". Wachovia Bank and Trust v Nat'l Student Mrktg. 650 F2d 342, 347 (D.C. Cir, 1980), cert.den., 101 S.Ct. 3098.

of limitations to Vaca actions.[8] None of these decisions applied the limitation period of Sec. 10(b) of the N.L.R.A.

In fact, not until Badon v G.M.C. 679 F.2d 93 (6th Cir., 1982) did the Sixth Circuit break new ground by applying the Section 10(b) limitation period.[9]

In Badon the Court sought to apply a Michigan arbitration vacation statute of limitation as per Mitchell. However, the Court found the Michigan statute inapplicable because it specifically excluded labor relations matters. Therefore, the Badon Court looked to Justice Stewart's concurrence in Mitchell and applied the six month limitation period of Sec.10(b).

Subsequently, the Sixth Circuit had occasion to consider whether Badon should

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[8] Gray v Int'l Assn. supra; Gallagher v Chrysler Corp. supra; Smart v Ellis. supra

[9] Badon was decided after Mitchell and after Petitioners filed their complaint. Badon was decided before Del Costello.

be afforded retroactive application in Pitts v Frito-Lay, 700 F2d 330 (6th Cir. 1983). The Pitts Court determined that the Badon (now the Del Costello) rule should not be applied retroactively. The Court came to such a conclusion by analyzing each of the three Chevron elements.

Subsequently, the Sixth Circuit had occasion to address the question of whether Del Costello, like Badon, should be limited to prospective only application. In reliance on Pitts, the Court found that the Del Costello rule should not be applied retroactively. La Bond v McLean Trucking Co., supra. That analysis should have been applied with equal force herein.

Retroactive application of Del Costello would cause substantial inequitable results. It would terminate Petitioners' suit after they have spent a great deal

of time and money. It would deprive them of their right to a "day in Court". Chevron, supra, at 108. The transfer of work challenged in this lawsuit resulted in Petitioners being deprived of many years of hard-earned seniority. Petitioners have suffered tremendous hardships due to this loss of seniority. In effect, many have actually lost their livelihood.

Petitioners relied upon the case law as it existed at the time. Petitioners merely seek the opportunity to present the merits of their case to an impartial trier of fact. In weighing the equities one reaches the inescapable conclusion that the scales are tipped dramatically in Petitioners' favor.

Like the Chevron case, nonretroactive application would be the most equitable method of dealing with the new Del Costello rule. There is ample basis in the

case law to avoid the injustice or hardship by a holding of nonretroactivity. Chevron, supra at 107. That ample case law should be employed herein.

II. THE STATUTE OF LIMITATIONS WAS TOLLED BY PETITIONERS' ATTEMPT TO EXHAUST THEIR INTERNAL UNION REMEDIES.

It is well established that equitable tolling principles should be applied in the proper circumstances. Leake v University of Cincinnati, 605 F2d 255 (6th Circ., 1979); Fox v Eaton Corp.,614 F2d 716 (6th Circ., 1980); Harris v Walgreen Distribution Center, 456 F 2d 588 (6th Circ., 1972); Goodman v City Products Corp., 425 F2d 702 (6th Circ., 1970). In determining whether or not to apply such principles, the question is whether or not the facts "justify the application of equitable principles of tolling." Fox v Eaton Corp., supra, at 718.

At the time Petitioners began to pursue their internal union remedies, all

indicators upon which they had reason to rely suggested that exhaustion of such remedies was a necessary prerequisite to filing a lawsuit. First, the Constitution of the International Brotherhood of Teamsters required (and still does require) such exaustion[10]. Second, the By-laws of Local 407 also incorporated the same exhaustion requirement. [11]

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[10] Article XIX, Sec.12(a) of the Constitution provides:

> Every member, officer, elected business agent, Local Union, Joint Council, or other subordinate body against whom charges have been preferred and disciplinary action taken as a result thereof, or against whom adverse rulings or decisions have been rendered or who claims to be aggrieved, shall be obligated to exhaust all remedies provided for in this Constitution and by the International Union before resorting to any court, tribunal, or agency against the International Union, any subordinate body or any officer or employee thereof.

[11] Article 23 of the By-laws of Local 407, provides:

[continued on next page bottom]

Third, the case law overwhelmingly supported the proposition that exhaustion of [12] internal union remedies was necessary.

[11 con't] The Union acknowledges that the Constitution of the International Brotherhood of Teamsters, Chauffers, Warehousemen, and Helpers of America supersedes any provisions of these By-laws herewith or hereinafter adopted which may be inconsistent with such Constitution. The Union hereby re-adopts as its Constitution, such International Constitution and incorporates herein by reference, as though fully set forth herein, all such provisions of such Constitution, as it may be interpreted, modified, or amended from time to time, which are applicable to Union matters and affairs, and shall perform all the duties imposed upon a Union by such Constitution.

[12] See e.g. Fleming v Chrysler Crp, 575 F2d 1187, (6th Circ., 1978); Ruzicka v General Motors Corp., 523 F2d 306, (6th Cir., 1975); Imel v Zohn Mfg.Co. 481 F2d 181; (10th Cir., 1973) cert.den. 414 US 915, (1974); Beherab v Eltra Corp.., 394 F2d 502, (6th Circ., 1968); Fabian vs Freight Drivers and Helpers Local No. 557 448 F. Supp. 835, (D.Md., 1978); Winter v Teamsters, Local 639, 569 F2d 146, (D.C. D.C. 1977); Willetts v Ford Motor Co., 583 F2d 852, (6th Cir., 1978); Schraam vs Complete Auto Transit, __F.Supp__, 101 LRRM 2178 (S.D.Mich 1979); Pullen v Gen'l Motors Corp, 444 F.Supp. 87, (D.C. Md., 1978); McGovern v IBT Local No. 773, 447 F. Supp. 368, (E.D., Pa., 1978);

Despite these factors the Court of Appeals found no merit to Petitioners' argument that their attempt to exhaust the available internal union remedies tolled the statute of limitations. However, the Court never really addressed the reasoning behind this finding. (Appendix, A-1 to A-11)

The anamoly of the Petitioners' "catch 22" plight is rather obvious. Had Petitioners chosen not to attempt to exhaust their internal union remedies and filed suit within six (6) months after the July 19th grievance decision, Respondents would undoubtedly have raised the defense of failure to exhaust internal union remedies. Unless some exception applied, the Court would have been duty-bound, at that time, to agree with Respondents and dismiss Petitioners' case. Thus, Petitioners were well-advised to attempt to

exhaust their internal union remedies before filing suit.

To do otherwise, Petitioners would have been required (in 1979) to anticipate several significant Supreme Court decisions, (Mitchell, Clayton and Del Costello) all of which would have significant impact upon their Sec.301 case.[13] This would be tantamount to requiring Petitioners to "walk a high tight-rope without a net beneath them". Weber v Kaiser Aluminum & Chemical Corp, 443 US 193, 210, Blackmun, J., concurring (1979); see also dissenting opinion of Judge Wisdom in Weber v Kaiser Aluminum & Chemical Corp., 563 F2d 216, 230, (5th Cir., 1977).

In Clayton, this Court addressed the doctrine of exhaustion of internal union remedies for the first time. The Court

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[13] At the time, none of these cases had even been decided by the Courts of Appeal.

chose to strictly limit application of the doctrine as a defense to a Vaca action. However, at the time Petitioners were faced with a choice of filing suit or exhausting their internal union remedies the state of the pre-Clayton law was such that exhaustion seemed the more prudent first step.

Simply because Clayton eliminated exhaustion as a prerequisite in this case, does not make tolling improper. Under the circumstances of this case, Petitioners' attempt to exhaust their internal union remedies should have acted to toll the running of the statute.[14]

Petitioners attempted to exhaust their internal union remedies before bringing suit in reliance upon the

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[14] It should also be noted that this Court has, at least implicitly, recognized that an attempt to exhaust internal union remedies might toll the running of the statute of limitations. Clayton, supra, at 695.

existing case law, the I.B.T. Constitution, and the By-laws of Local 407. It would be inappropriate to deny Petitioners their day in court because they relied upon these authorities. The facts and circumstances of this case overwhelmingly "justify the application of equitable tolling principles." Fox v Eaton, supra at 718. The Court of Appeals erred in not applying these principles.

III. THE DOCTRINE OF ARBITRAL FINALITY SHOULD NOT HAVE BEEN APPLIED TO THE GRIEVANCE DECISIONS INVOLVED HEREIN.

The principle of lending finality to a conclusive decision rendered by the grievance procedure is the logical underpinning of this whole area of law. The doctrine of finality is the reason why most Section 301 suits are uniquely "hybrid" in nature. Vaca v. Sipes, 386 US 171 (1967)

The rule of arbitral finality was developed in order to effectuate the

national policy which favors the settlement of labor-management disputes by those processes chosen by the Union and the employer as specified in their collective bargaining agreement. United Steelworkers v. American Mfg.Co, 363 US 564 (1960); U.S.W.A. v. Warrior and Gulf Navigation Co., 363 US 574 (1960); Hines v. Anchor Motor Freight, Inc., 424 US 554 (1976). The Mitchell and DelCostello decisions both recognize the importance afforded to the rule of arbitral finality. Without a final and binding decision by the grievance procedure, the analysis of both Mitchell and DelCostello are inapplicable. The rule of finality is the logical underpinning of both decisions.

Under this principle, final and binding grievance decisions are generally adhered to by the courts in order to effectuate the intent of the parties to the collective bargaining agreement.

Petitioners' suit challenged both the grievance decision of July, 1979 and the earlier withdrawal of their grievance by Defendants in September, 1978. The grievance procedure of the N.M.F.A. (Article 45, see Appendix E) provides for final and binding decisions only when the Joint Local Area Committee, the Joint State Cartage Committee, or the Joint Area Cartage Committee, (or in some circumstances not applicable herein, an umpire) settle disputes by majority vote. The record reveals that this did not happen in this case with respect to Petitioners' earlier grievances.

These grievances were deadlocked before the Joint Local Area Committee and the Joint State Cartage Committee. A hearing before the Joint Area Cartage Committee was set for September 22, 1978, but on September 14, 1978, Local 407 withdrew the grievances. Petitioners

alleged that the withdrawal was in bad faith and in breach of the union's duty of fair representation. Local 407 alleged that the grievances were "settled".

There is no provision in the contract making such a "withdrawal" or "settlement" final and binding. Thus, it should not be accorded application of the rule of arbitral finality.

To afford final and binding effect to the non-decision in question would be thoroughly inconsistent with the "means selected by the parties" for "final adjustment of grievances" as expressed in the language of the collective bargaining agreement. UMW v Barnes & Tucker Co., 561 F2d 1093 (3rd Cir., 1977); Badon v G.M.C., supra. As such, the grievance cannot be afforded finality.

Further, the Joint Committee which decided the grievance in July, 1979 was not the appropriate forum to make such a

determination. Under the relevant terms of the N.M.F.A., contractual determinations relating to such changes of operations are exclusively within the province of a separate and distinct collective bargaining entity, the Change of Operations Committee. [N.M.F.A., Article 8, Sec. 6 (a) and (d), see Appendix E.] As such, the Joint Committee had no "contractual jurisdiction" to decide the grievance. It has been held that:

> When an arbitration board ventures outside the scope of the authority conferred on it by the collective bargaining agreement, it lacks power to bind the parties. Northwest Airlines, Inc. v Airlines Pilots Assn. Int'l. 530 F2d 1048, 1050 (D.C. Cir. 1976)

In this case, the Joint Committee rendered a decision which was outside the scope of its authority as per the contract. Thus, its decision should not have been accorded application of the rule of arbitral finality. To afford

finality to the grievance "decisions" in this case would contravene the language of the contract rather than enforce it. This would thoroughly contradict the principles of the Steelworkers Trilogy.

The Del Costello and Mitchell decisions are only applicable to a grievance decision that must be accorded application of the rule of arbitral finality. Since neither grievance "decision" at issue in this case was final and binding, neither Del Costello nor Mitchell have any application.

CONCLUSION

For the reasons set forth above, it is respectfully urged that the petition for certiorari be granted.

Respectfully submitted,

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Cleveland, Ohio 44113
(216) 241-5151

AFFIDAVIT OF SERVICE

STATE OF OHIO)
) SS
CUYAHOGA COUNTY)

I, THEODORE E. MECKLER, after first being duly sworn according to law, do hereby certify that three (3) copies of the foregoing Petition have been deposited in a United States mailbox with first class postage prepaid on this _____ day of December, 1983 and sent to Edward Kaminski, counsel for Respondent, Roadway, P.O. Box 1500, One Cascade Plaza, Akron, Ohio 44309; and Sorrell Logothetis, counsel for Respondents, Local 407, Joint Council 41, National Committee and Joint Committee, 111 West First Street, Suite 1100, Dayton, Ohio 45402: and Scott Soldon, counsel for Respondent, C.C.T., 788 North Jefferson Street, P.O. Box 92099, Milwaukee, WI 53202, with three (3) copies of this Petition for each of the aforementioned counsel.

_____
THEODORE E. MECKLER
Attorney for Petitioner

SWORN TO AND SUBSCRIBED in my presence on this _____ day of December, 1983.

_____
NOTARY PUBLIC

APPENDIX

82-3078

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GUY W. BRAIN, et al.,)
)
Plaintiff-Appellants)
)
v.)
)
ROADWAY EXPRESS, INC.,)
et al.,) ORDER
)
Defendants-Appellees.)

Before: KEITH and MERRITT, Circuit Judges and BROWN, Senior Circuit Judge

This is an appeal from a judgment of the district court which granted summary judgment in favor of the defendants in an action brought pursuant to Section 301 of the Labor Management Relations Act (LMRA). [1]

The appellants are employees of the appellee employer, Roadway Express, and members of the appellee union, the International Brotherhood of Teamsters. During the spring of 1978, Roadway began transferring work from the Cleveland terminal,

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[1] 29 U.S.C. Sec. 185.

where the appellants were employed, to other terminals. The collective bargaining agreement provided that such transfers of work must be processed through the Change of Operations Committee.[2] The appellants, alleging that the appropriate procedures for work transfers were not followed, filed grievances in May 1978.

These grievances were heard by the Joint Area Local Committee and the Joint State Cartage Committee. Both committees deadlocked on the issue and the griev-

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[2] Article 8, Section 6 of the collective bargaining agreement, which governed work transfers, provided:

Present terminals, breaking points or domiciles shall not be transferred or changed without the approval of an appropriate Change of Operations Committee. Such Committee shall be appointed in each of the Conference Areas, equally composed of Employer and Union representatives. The Change of Operations Committee shall have the authority to determine the seniority of the employees affected and such determination shall be final and binding.

ances were forwarded to the Joint Area Cartage Committee. A hearing was scheduled for September 22, 1978. However, Local 407, the appellants' local, withdrew the grievances. Local 407 asserted that the withdrawal occurred after the grievances were settled. The settlement agreement provided that three dockworkers who had been laid-off in May 1978 due to the transfer of work were to receive two days wages. Meanwhile, Roadway continued to transfer work from the Cleveland terminal and in December 1978 it began laying off workers.

Five of the plaintiffs filed grievances as a result of the layoffs. These grievances were also brought before the Joint State Committee who heard the grievance and deadlocked on the issue. On July 19, 1979, the Joint State Committee

heard the grievance and in a unanimous decision ruled that Roadway had not violated the collective bargaining agreement. The decision was orally announced to the employer and the union. According to the appellees, four of the five appellants were also present when the decision was announced.

On August 23, 1979, the Roadway employees at the Cleveland terminal were informed that they could transfer to other terminals upon the condition that they would be placed at the bottom of the seniority lists of the terminals. Most employees accepted this offer, except the appellants, who contended that they were entitled to be "dovetailed" into the other terminals' seniority lists.

The appellants brought suit through internal union procedures alleging that

four of the local union officers had breached their duty of fair representation. This action traversed through union procedures until February 14, 1981 when the General Executive Board decided in favor of the union officials.

On December 18, 1983, prior to the General Executive Board decision, the plaintiffs also filed suit under Section 301 of the LMRA against the union and the employer.[3] Restoration of seniority benefits, back wages, fringe benefits, and damages for emotional distress were sought against Roadway. Reasonable attorney's fees and $100,000 in punitive dam-

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[3] The Plaintiffs-appellants named the following parties as defendants: 1) Roadway Express, Inc., the employer; 2) Local 407, the local union representative; 3)Joint Council 41 of the International Brotherhood of Teamsters; 4) the Teamsters Freight industry Negotiating Committee; 5) Freight Division Central Conference of Teamsters; and 6)

ages were sought against the appellee unions.

On April 21, 1981, the United States Supreme Court decided United Parcel Service, Inc. v. Mitchell, 451 U. S. 56 (1981) where it was held that the statute of limitations for actions brought under Sec.301 of LMRA is to be determined by reference to the statute of limitations of an analogous state law, e.g., the statute of limitations governing actions to vacate arbitration awards. Appellee Roadway, in response to the Mitchell decision, filed a motion to amend its answer to assert the statute of limitations defense on May 20, 1981. The district court granted Roadway's motion. On July 2, 1981, the other defendants filed similar motions which were granted by the district court on August 11, 1981.

All the appellees filed motions for summary judgment on August 17, 1981, which were granted on December 3, 1981. Citing the Mitchell decision, the district court ruled that Sec.2711.13 of the Ohio Rev. Code Ann. was the applicable statute of limitations. This section of the Ohio Code provides that there is a ninety day statute of limitations for the vacating of an arbitration award. Since the plaintiffs had filed their suit well after the ninety days provided for by the statute, the district court granted the defendants' motion for summary judgment and dismissed the case. The plaintiff-appellants now appeal that decision.

We affirm the district court's decision that the defendants were entitled to a summary judgment. However, we uphold the district court's decision upon a

basis different from that given by the district court. In granting the defendants' motion for summary judgment, the district court correctly relied upon United Parcel Service v. Mitchell, 451 U.S. 56 (1981). The Supreme Court in Mitchell held that the statute of limitations in an action brought under Sec. 301 is to be determined, as a matter of federal law, by reference to an analogous state statute of limitations. Using the analysis employed by the Supreme Court in Mitchell, the district court correctly found that the appropriate state statute of limitations was Ohio Rev. Code Ann. Sec. 2711.13. According to this statute, notice of a motion to vacate an arbitration award must be given within ninety days after the award is given to the parties. Because the plaintiff-appel-

lants failed to bring their suit within this ninety day period, the district court correctly granted the defendants' motions for summary judgment.

Although the district court was correct in its decision, the recent case DelCostello v. International Brotherhood of Teamsters, __US__, 103 S.Ct. 228 (1983), compels us to reach the same result for a different reason. In Del Costello, the Supreme Court held that the six month statute of limitations imposed by Sec.10(b)[4] of the National Labor Relations Act (NLRA) is to be applied when an employee brings a Sec.301 action against both his employer for breach of the collective bargaining agreement and his union for breach of its duty of fair

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[4] 29 U.S.C. Sec.160(b).

representation.[5] Justice Brennan, writing for the majority, stated that Sec.10(b) furthered the "federal policies at stake and the practicalities of litigation make [Sec.10.(b)] a significantly more appropriate vehicle for interstitial lawmaking." DelCostello, supra, at 2294.

Thus, the six month statute of limitations provided by Sec.10(b) of the NLRA is the appropriate measure to be used. Although the DelCostello decision extended the statute of limitations to six months from the district court's original ruling of ninety days, the appellants failed to meet this requirement as well.

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[5] This was the position originally taken by Justice Stewart in his concurring opinion in United Parcel Service, Inc. v. Mitchell, supra. However, the majority of the Court refused to adopt this position since it had not been raised by the parties on appeal. See Mitchell, 101 S.Ct. at 1562 n.2, 1565-66.

Appellants did not bring their Sec.301 action until at least seventeen months after their claim arose, and thus, their action is barred by Sec.10(b).

Finally, we find no merit in any of the arguments presented by the appellants. These arguments, which were raised in the appellants' opposition to the appellee's motion for summary judgment, were properly dismissed by the district court. Accordingly, the decision of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN,
Clerk of the Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

GUY W. BRAIN, et al., Plaintiffs,	)	CASE NO. C80-2338
	)	JUDGE JOHN MANOS
v.	)	
ROADWAY EXPRESS, INC., et al.,	)	
	)	MEMORANDUM
Defendants.	)	OF OPINION

On December 18, 1980 the plaintiffs, eighteen employees of Roadway Express, Inc. and members of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, filed suit against the defendants: Roadway Express, Inc.; Truck Drivers, Local 407, International Brotherhood of Teamsters, Chauffers, Warehousemen, and Helpers of America; Joint Council 41, International Brotherhood of Teamsters; Teamsters National Freight Industry Negotiating Committee; Freight Division Central Conference of Teamsters, and the Joint

State Cartage Committee, for violations of section 301 of the Labor Management Relations Act, 29 U.S.C. Sec.185. Plaintiffs allege that Roadway breached the relevant collective bargaining agreement, the Naitonal Master Freight Agreement and the Central States Area Local Cartage Supplemental Agreement (hereinafter NMFA), and that the union defendants failed to represent them fairly or colluded with the other defendants to deprive them of their rights under the NMFA. Plaintiffs seek as relief against Roadway restoration of their seniority benefits, back wages, fringe benefits and monetary relief for emotional stress and as relief against the other defendants $100,000 in punitive damages and reasonable attorney's fees and costs. Between January 12 and March 30, 1981, the defendants answered, denying their liability.

In response to the Supreme Court's ruling in United Parcel Serv., Inc. v. Mitchell, __US__, 101 S.Ct. 1559 (1981) decided on April 20, 1981, Roadway on May 20 filed a motion to amend its answer to plead the statute of limitations. On June 22 this court granted defendant Roadway's motion to amend. On July 2 the other defendants also filed a motion to amend their answers to plead the statute of limitations. On August 11 this court granted the other defendants' motion. On August 17, 1981 all of the defendants filed motions for summary judgment on the statute of limitations defense. On September 14, 1981 the court granted plaintiffs a fourteen day extension of time to reply to the defendants' motions. On October 1 plaintiffs filed a second motion for extension of time which the court denied on Ocotber 5. On October 13

plaintiffs submitted a brief in opposition and a motion instanter for the court to accept the brief. The court now grants plaintiffs' motion instanter. Between November 11 and 17, 1981 the defendants filed reply briefs to the plaintiffs' brief in opposition. For the reasons discussed below, the defendants' motions for summary judgment are granted.

I.

Plaintiffs were dockworkers at Roadway's Cleveland Terminal and members of Teamsters Local 407. In Spring of 1978 Roadway began transferring work from its Cleveland Terminal to other terminals, especially its Copley Terminal. Article 8, Section 6 of the NMFA provided that transfer of work must be processed through the Change of Operations Committee. Plaintiffs asserted that Roadway did not follow this procedure, and accordingly they filed grievances in May 1978.

The grievances were deadlocked before the Joint Local Area Committee and the Joint State Cartage Committee.[1] A hearing on the grievances before the Joint Area Cartage Committee was set for September 22, 1978, but on September 14, 1978, Local 407 withdrew the grievances. Plaintiffs assert that the withdrawal was in bad faith and in breach of the union's duty of fair representation. Local 407 maintains that the grievances were settled for payment of two days wages to three dockworkers who allegedly had been put on layoff in May because of the transfer of work.

Roadway continued to tranfer work from its Cleveland Terminal to other terminals. In December 1978 Roadway also began

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1 These Joint Committees are the grievance machinery of NMFA; majority decisions of a committee are final and binding on both parties.

to layoff workers at the Cleveland Terminal. Plaintiffs assert a causal connection between the layoffs and the transfers. Five of the plaintiffs filed grievances over the layoffs and the transfer of work; the hearing before the Joint Local Committee was deadlocked.

On July 19, 1979 the Joint State Committee heard the grievances and rendered a unanimous decision that Roadway had not violated the contract. At least four of the five grievants were present at the hearing. According to the procedure of the Joint State Committee, it adjourned after hearing the arguments, decided the grievance and then reconvened and announced its decision orally to the employer, the union and the grievants. Copies of the minutes were mailed to the union and the employer within two months of the hearing; copies were not sent to the grievants.

On August 23, 1979 Local 407 presented Roadway's Cleveland Terminal employees with an opportunity to transfer to the Copley Terminal on a "take it or leave it" basis. This transfer provided that the Cleveland employees would not be "dovetailed" into the Copley employee list according to seniority. Most of the employees accepted the offer.

On November 15, 1979 plaintiffs filed internal union grievance charges for breaches of the duty of fair representation against four Local 407 officials: C. Jim Kinney, the Local's president; Joe Lawler, the Local's vice-president; Russ Mazzola, the Local's business agent; and Robert Moody. The plaintiffs pursued these remedies to the General Executive Board of the International Brotherhood of Teamsters, the highest level of appellate procedure for the union. On Feburary 14,

1981 the General Executive Board ruled against plaintiffs on their internal union charges. Plaintiffs are now members of Teamsters' Local 29 which operates in the Akron area.

II.

The defendants have moved for summary judgment, arguing that plaintiffs' claims are barred by the applicable statute of limitations, Ohio Revised Code, Section 2711.13, Motion to vacate, modify, or correct an [arbitration] award, which provides in pertinent part: "Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is delivered to the parties in interest..."

Although the decision of an arbitration board, such as a Joint Committee, is final and binding on an employee, if the

employee can show that the arbitral process had been seriously undermined by the union's failure to represent him fairly, he may obtain judicial review of his claim under section 301 of the Labor Management Relations Act. Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 96 S.Ct. 1048 (1976) and Smart v. Ellis Trucking Co., Inc., 580 F.2d 215 (6th Cir. 1978), cert. denied, 99 S.Ct. 1497 (1979). However, Congress did not provide a statute of limitations for section 301. Therefore, in International U., U.A., A. & A.I.W. v. Hoosier Cardinal Corp., 383 U.S. 696, 86 S.Ct. 1107 (1966) the Supreme Court held "that the timeliness of a section 301 suit...is to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations." 86 S.Ct. at 1113.

In Mitchell, supra, the Court elaborated on what standards should be used

in determining the appropriate state statute of limitations. Mitchell had been discharged by his employer for dishonest acts. He filed a grievance seeking reinstatement, but the Joint Panel upheld the discharge. Seventeen months later Mitchell filed his section 301 suit against the union and his employer. The defendants had moved for summary judgment on the ground that the action was barred by New York's ninety day statute of limitations for actions to vacate arbitration awards.[2] Mitchell argued that New York's six year limitations period for breach of contract should apply.[3]

The Court held that the ninety day

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2 New York Civil Practice Law (McKinney) section 7511(a) provides that "an application to vacate or modify an [arbitration] award may be made by a party within ninety days after its delivery to him.

3 New York Civil Practice Law Section 213(2).

arbitration statute was more appropriate. The Court reasoned that because the employee, before he may litigate the issue of the employer's breach of contract, must show that the union breached its duty of fair representation, the suit is "more analagous to an action to vacate an arbitration award than to a straight contract action." 101 S.Ct. at 1564 (footnote omitted) Moreover, the adoption of the shorter arbitration statute of limitations promotes the leading federal policy of "relatively rapid disposition of labor disputes." Id. The Court then observed in footnote 5, Id, that twenty-eight states have ninety day arbitration statute of limitations. The Court further supported the need for rapid disposition of such suits by recognizing that the arbitration process often interprets critical terms of the collec-

tive bargaining agreement affecting the entire relationship between company and union and subsequent modifications of the agreement. If such critical decisions could be called into question as much as six years later, the entire collective bargaining system could easily become unworkable. Id.

Given the strong reasons announced by the Supreme Court for adopting the arbitration statute of limitations and that the facts in Mitchell and the present case are nearly identical, this court must hold that Ohio Revised Code Section 2711.13 is the appropriate statute of limitations for section 301 suits brought in Ohio.

Plaintiffs, in their brief in opposition to defendants' motions for summary judgment, propose seven arguments for either tolling or not applying the ninety day arbitration statute of limitations.

The first argument is that the defendants waived the statute of limitations defense by raising it several months after the case had been filed. The plaintiffs rely upon Hayden v. Ford Motor Company, 497 F.2d 1292 (6th Cir. 1974) in which the circuit court held "that statute of limitations are designed primarily for the benefit of persons against whom claims may be made and, in consequence, are 'personal privilege' defenses that are waived unless asserted at the earliest possible moment." Id. at 1294. In Hayden the plaintiff filed two actions: one timely in state court and the other in federal court ouside the limitations period. When the defendant did not raise the statute of limitations as a defense to the federal suit, plaintiff voluntarily dismissed her state action. Six months later the defendant raised its defense of

the statute of limitations. Under these facts the Sixth Circuit held that the defendant had waived its defense.

However, the Sixth Circuit has limited the Hayden decision to cases in which the plaintiff has been prejudiced by the defendant's failure to raise the defense. In Estes v. Kentucky Utilities Co., 636 F.2d 1131 (6th Cir. 1980) the plaintiff, injured while working for the defendant, received worker's compensation and then filed suit against the defendant. Three and a half years after the suit had been initiated, the defendant raised the defense of the exclusivity of worker's compensation. In upholding the dismissal of the case on that issue, the circuit court held that "[w]hile it is inexcusable for a defendant to induce, either directly or indirectly, a plaintiff to forego a legal remedy, it is certainly allowable for the defendant to assert a

valid legal defense to a claim where no such inducement takes place." Id. at 1134. In its ruling the court specifically distinguished Hayden. Moreover in Pierce v. County of Oakland, 652 F.2d 671 (6th Cir. 1981) the court upheld the dismissal of a case on the statute of limitations defense, raised on the day of trial. The court again distinguished Hayden because the plaintiff had not been prejudiced by the defendant's raising of the defense well after the suit had been filed.

In the present case the plaintiffs have not been prejudiced by the defendants' raising the statute of limitations several months after the suit had been filed. Moreover, the defendants raised the defense quickly after the Supreme Court had clarified the issue with the Mitchell decision. Therefore, no waiver occurred.

Plaintiffs' second argument is that the Mitchell decision should not be applied retroactively. They contend that Chevron Oil Company v. Huson, 704 U.S. 97, 92 S.Ct. 349 (1971) establishes three standards, which, if satisfied, require a decision to be applied prospectively: (1) determine if the new decision overrules clear past precedent or decides an issue of first impression when resolution was not clearly foreshadowed; (2) examine the prior history of the rule in question and whether retrospective operation will further or retard its operation; and (3) weigh any inequities imposed by retroactive application. However, the general rule is that decisions are give retroactive effect. Unless the party seeking the prospective-only application can prove that each of the three Chevron Oil factors is satisfied, the decision is given retroactive effect. Jiminez v.

Weinberger, 523 F.2d 689, 704 (7th Cir. 175) cert. denied, 427 U.S. 912, 96 S.Ct. 3200 (1976); Schaefer v. First National Bank of Lincolnwood, 509 F.2d 1287, 1294 (7th Cir. 1975) cert. denied, 425 U.S. 943, 96 S.Ct. 1682 (1976); and Cochran v. Birkel, 651 F.2d 1219 (6th Cir. 1981).

The clear past precedent upon which Plaintiffs rely are Smart v. Ellis, supra, 580 F.2d 215 (6th Cir. 1978) and Gallagher v. Chrysler Corporation, 613 F.2d 167 (6th Cir. 1980) cert.denied, 101 S.Ct. 119 (1980).[4] In those cases the Sixth Circuit held that in Michigan the appropriate state statute of limitations to apply to section 301 suits was the state's three year statute of limitation for injuries to persons or property.[5]

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4 The Sixth Circuit decided Gallagher on January 22, 1980, several months before the Supreme Court decided Mitchell.

5 In Smart the Sixth Circuit rejected Michigan's arbitration statute of limitations.

Thus plaintiffs have satisfied the first of the Chevron Oil criteria, but they do not satisfy the remaining two.

The rule in question is the federal labor law policy of "relatively rapid disposition of labor disputes." Retroactive application of the rule will further this policy. It will insure that the important elements of a collective bargaining agreement will not be called into question years later. Prospective application of Mitchell could only retard the federal policy in question. Therefore, plaintiffs are unable to satisfy the second criteria established in Chevron Oil, and this court must give the Mitchell decision retroactive application.

In Kikos v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Civil Action No. 78-70521 (E.D. Mich. 1981), the district

court confronted substantially similar facts and held that the Mitchell case must be applied retroactively, despite the circuit's decisions in Smart and Gallagher. The court specifically ruled that the equities did not prohibit retroactive application. The Seventh Circuit also applied Mitchell retroactively in Davidson v. Roadway Express, Inc., 650 F.2d 902 (7th Cir. 1981)[6]

Plaintiff's third argument is that the Joint Committee process is so different from traditional arbitration processes that the rule in Mitchell should not be applied. This argument is not persuasive. Mitchell is indistinguishable from the present case. Both cases involve union grievance procedures and state arbitration statutes. The Court all but expli-

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6 Judge John Peck, Senior Circuit Judge for the Sixth Circuit Court of Appeals sat on this case by designation.

citly rejected plaintiffs' argument when it ruled that applying the ninety day arbitration statute, the relatively rapid disposition of labor dispute would be promoted and then observed that the New York statute "is typical in providing a relatively short limitations period for actions to vacate arbitration awards...28 [states] have a period of 90 days." Mitchell, 101 S.Ct. at 1565, fn.5. Furthermore, the Seventh Circuit in Davidson, supra, in interpreting the NMFA held that the supplemental agreement does in fact establish an arbitration procedure..." 650 F.2d at 904. fn. 1.

Plaintiffs' fourth argument is that several other Ohio statutes would be more appropriate than the arbitration statute. Plaintiffs suggest Ohio's two year statute for injury to person or property, Ohio Revised Code section 2305.10, or the four year statute for an injury to the

rights of plaintiff not arising in contract, Ohio Revised Code section 2305.04, or the six year statute for an action upon liability created by statute other than a forfeiture or penalty, Ohio Revised Code section 2305.07. Given the Supreme Court's reasoning in Mitchell, none of the statutes can be considered more appropriate than the arbitration statute.

Plaintiffs' fifth argument is that the arbitration statute of limitations was tolled by their attempt to exhaust internal union remedies. Plaintiffs correctly note that it had long been held that a party could not bring his section 301 action until he had exhausted internal union remedies. However, this is no longer the law. In Clayton v. International Union, __US__, 101 S.Ct. 2088 (1981), the Supreme Court held that if

internal union remedies "cannot result in reactivation of the employee's grievance or an award of the complete relief sought in his section 301 suit, exhaustion will not be required with respect to either the suit against the employer or the suit against the union." 101 S.Ct. at 2093.

In the present case plaintiffs' internal union remedies would not result in either the reactivation of their grievances or the full relief sought in the section 301 suit, (i.e., restoration of their seniority). The Constitution of the International Brotherhood of Teamsters, Article XIX, Section 9(a) provides that the penalties imposed by the Union "may consist of reprimands, fines, suspensions, expulsions, revocations, denial to hold any office permanently or for a fixed period or commands to do or perform, or refrain from doing or performing, specified acts." Even assuming

that on July 23, 1979 Local 407's presenting to the plaintiffs an offer to transfer to Copley was a grievance which the plaintiffs could have raised against Roadway, the time for raising or reactivating any grievance had passed when the plaintiffs initiated their internal union procedures in November, 1979. The NMFA, Article 45, Section 1(i) provides in pertinent part:

> Any claim by an employee covered by this Agreement for additional compensation or benefits must be presented in writing within thirty (30) days from the end of the month in which the employee had knowledge of said claim. Failure to submit a claim within said thirty (30) days shall automatically bar any such claim from being presented to or against said Carrier either under this Agreement or otherwise.

This provision is equivalent to the clause in the collective bargaining agreement which the Supreme Court held in Clayton barred reactivation of the grievance. 101 S.Ct. at 2096.

In Clayton the Supreme Court analyzed why exhaustion of internal union remedies was undesirable, if the plaintiffs could not obtain full relief from the union procedures. Citing Mitchell the Court ruled that the "allegation [breach of the union's duty of fair representation] raises issues rooted in statutory policies extending far beyond internal union interests." Id. at 2095. If full relief could not be granted, exhaustion would not serve the national labor policy. "In such cases, exhaustion would be a useless gesture: it would delay judicial consideration of the employee's Sec.301 action..." Id at 2097. Relying on Mitchell again the Court held that the important federal policy of "relatively rapid disposition of labor disputes" would be undermined by exhaustion, if the union remedies could not provide full relief.

The Supreme Court continued its analysis and specifically rejected the union's argument that the exhaustion defense should be available to the union, even if the defense was not available to the employer. The court reasoned:

A trial court requiring exhaustion with respect to the suit against the union, but not with respect to the suit against the employer, would be faced with two undesirable alternatives. If it stayed the action against the employer pending resolution of the internal appeals procedures, it would effectively be requiring exhaustion with respect to the suit against the employer, a result we have held would violate national labor policy. Yet if it permitted the action against the employer to proceed, and tolled the running of the statute of limitation in the suit against the union until the internal procedures had been exhausted, it could very well find itself with two separate Sec.301 suits, based on the same facts, proceeding at different paces in its courtroom. As we suggested in Vaca v. Sipes, supra, 386 U.S., at 197, 87 S.Ct., at 920, this is a result that should be avoided if possible. The preferable approach is for the court to permit the employee's Sec.301 action to proceed against both defendants, despite the employee's failure to exhaust, unless the internal union procedures can reactivate the grievance or grant the relief that would be available in the employee's Sec.

301 suit against both defendants. Id, at 2098-99. (Emphasis added)

This court adopts the Supreme Court's suggested approach and holds that because the plaintiffs' internal union grievances would not have resulted in the reactivation of the grievances or the substantive relief sought, the statute of limitations was not tolled while the plaintiffs pursued their internal union remedies.

The Sixth Circuit foreshadowed the Court's Clayton ruling in Geddes v. Chrysler Corp., 608 F.2d 261 (6th Cir. 1979). In that case the district court granted the defendants' motions for summary judgment on the plaintiff's section 301 suit for failure to exhaust internal union remedies. The circuit court reversed and remanded as to both the employer and the union. The court held that exhaustion of internal union remedies is not a defense

available to an employer.[7] As to the union the court recognized that the policy arguments favoring delay and exhaustion "are weakest in a case like this one, which is not wholly a dispute between a union and its members, but rather is a 'complex problem concerning employer, union, and employee member'." 608 F.2d at 264, citing N.L.R.B. v. Marine Workers, 391 U.S. 498, 425, 88 S.Ct. 1717, 1722 (1968). The court also noted in dicta that:

> [s]ome cases have gone so far as to hold that the doctrine requiring exhaustion of internal remedies is inapplicable to cases not involving purely union problems. See, e.g., Brady v. Trans World

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7 Thus regardless of the Supreme Court's holding in Clayton, the Sixth Circuit's ruling in Geddes mandates that summary judgment be granted for defendant Roadway. If exhaustion is inapplicable to an employer, an employee could not rely on exhaustion to toll the statute of limitations for his suit against the employer. This same reasoning would also apply to the defendant Joint Committee, which is not part of the Union.

Air Lines, 223 F.Supp. 361 (D. Del. 1963), aff'd. 401 F.2d 87 (3rd Cir. 1968), cert. denied 393 U.S. 1048, 89 S.Ct. 680, 21 L.Ed.2d 691 (1966).

608 F.2d at 264. However, the Court declined to base its decision on this reasoning. It preferred to remand for further proceedings on the narrower grounds of the applicability of the futility doctrine.

The plaintiffs also argue that their union constitution required them to exhaust their internal union remedies before bringing suit. In Clayton the Supreme Court rejected this argument citing Marine Workers, supra:

...we held that respondent union could not discpline one of its members for failing to exhaust internal appeals procedures before filing an unfair labor practice charge with the NLRB, because the unfair labor practices charge was "in the public domain and beyond the internal affairs of the union." 391 at 425, 88 S. Ct., at 1722. A proceeding by the [NLRB] is not to adjudicate private rights but to effectuate a public policy, and [a]ny coercion used to discourage, retard, or defeat...access [to those proceedings] is

beyond the legitimate interests of a labor organization. 391 at 424, 88 S.Ct., at 1721.

Plaintiffs' sixth argument is that the arbitration statute is tolled until a written award has been delivered to all plaintiffs. Ohio Revised Code section 2711.13 requires that the award must be delivered to the parties in interest before the statute begins to run. Plaintiffs argue that this provision can only be satisfied through Ohio Revised Code section 2711.08 which provides:

> The award made in an arbitration proceeding must be in writing and must be signed by a majority of the arbitrators. A true copy of such award without delay shall be delivered to each of the parties in interest. The parties to the arbitration agreement may designate therein the county in which the arbitration shall be held and the award made.

Although both the union and the employer received written copies of the Joint Committee's decision, the individual grievants did not receive such written copies. Plaintiffs conclude that the

arbitration statute never began to run against them.

However, the Supreme Court has rejected this reasoning. In Mitchell, the reviewing Court of Appeals did not adopt the arbitration statute "in part because of its view that discharged employees could not institute such actions under New York law..." 101 S.Ct. 1563, fn. 3. The Court ruled: "The fact that an employee could not bring a direct suit to vacate an arbitration award, however, does not mean that his section 301 claim, which if successful would have the same effect is not "closely analogous" to such an action." Id. Similarly, that the grievants are not entitled to a written award, does not mean that section 2711.13 is not the appropriate statute to apply. Obviously, the Court intended to borrow the limitations period of the arbitration

statute, even if the procedural elements of the Arbitration Act do not apply to the grievance machinery of a collective bargaining agreement. Moreover, plaintiffs cannot claim prejudice by the failure to receive notice, because most of the grievants heard the Joint Committee's decision on July 19, 1979.

Plaintiffs' final argument is that the doctrine of arbital finality is not applicable to the grievance decisions involved because the Change of Operations Committee is the appropriate entity to determine the labor issues involved. In essence the plaintiffs argue that the Joint Committee had no jurisdiction to hear their complaints. However, Article 8, Section 6(g) of the NMFA vests the Joint Committees with the power to decide issues of seniority:

> Accordingly, the parties acknowlege that questions of the application of seniority

rights may arise which require different treatment and it is anticipated and understood that the Employers and the Unions jointly involved and/or the respective grievance committees may mutually agree to such disposition of questions of seniority which in their judgment is appropriate under the circumstances... In all cases the seniority decisions of the Joint Committees, including the Change of Operations Committees and Subcommittees, established by the National Master Freight Agreement and the respective Supplemental Agreements shall be final and binding.

Accordingly, this court holds that the ninety-day arbitration statute of limitations is the appropriate statute to apply in this case, that there are no reasons why the statute should be tolled or not applied, and that plaintiffs filed their suit well after the ninety days allowed by the statute. Defendants' motions for summary judgment are granted and the case is dismissed.

IT IS SO ORDERED.

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UNITED STATES
DISTRICT JUDGE
(JOHN M. MANOS)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

GUY W. BRAIN, et al., Plaintiffs,	CASE NO. C80-2338
v.	JUDGE JOHN MANOS
ROADWAY EXPRESS, INC., et al., Defendants.	ORDER

IT IS HEREBY ORDERED that pursuant to memorandum of opinion in the above-captioned case, all the defendants' motions for summary judgment are granted and the case is dismissed.

UNITED STATES
DISTRICT JUDGE
(JOHN M. MANOS)

No. 82-1576
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GERALD A. LaBOND, ET AL.,)
Plaintiffs-Appellants)
)
v.)
)
McLEAN TRUCKING COMPANY) ORDER
Defendant-Appellee)

BEFORE: CONTIE and KRUPANSKY, Circuit Judges; and REED, District Judge

The defendant-appellee moves this Court to reconsider its order reversing the district court's order which had dismissed plaintiffs' Sec.301 suit for being time-barred by the six-month time period provided in Sec.10(b) of the National Labor Relations Act. The defendant contends that the Supreme Court has recently mandated that the six-month time period shall be applicable to circumstances like those involved in the instant case. Del Costello v. International Brotherhood of

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* The Honorable Scott Reed, District Judge, U.S. District Court for the Eastern District of Kentucky, sitting by designation.

Teamsters, __U.S.__, 51 U.S.L.W. 4693 (June 8, 1983).

As the plaintiffs correctly point out in their response to the defendant's motion to reconsider, the Supreme Court did not decide in DelCostello to give their decision retroactive application; rather, the Supreme Court essentially rendered an opinion in accord with this Court's decision in Badon v. General Motors Corp., 679 F.2d 93 (6th Cir. 1982). Absent a Supreme Court ruling on the issue of retroactivity, it is clear that this Court's decision in Pitts v. Frito-Lay, Inc., 700 F.2d 330 (6th Cir. 1983) to give the Badon decision prospective application only is the controlling law in the instant case.

The defendant's motion to reconsider is, accordingly, denied.

ENTERED BY ORDER OF THE COURT

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JOHN P. HEHMAN, Clerk

NATIONAL

MASTER FREIGHT

AGREEMENT

covering

OVER-THE-ROAD AND LOCAL CARTAGE

EMPLOYEES OF PRIVATE, COMMON, CONTRACT

AND LOCAL CARTAGE CARRIERS

FOR THE PERIOD OF

APRIL 1, 1979 THROUGH MARCH 31, 1982

(emphasis added)

ARTICLE 8. NATIONAL GRIEVANCE PROCEDURE

...Section 6(a) Present terminals, breaking points or domiciles shall not be transferred or changed without the approval of an appropriate Change of Operations Committee. Such Committee shall be appointed in each of the Conference Areas, equally composed of Employer and Union representatives. The Change of Operations Committee shall have the authority to determine the seniority of the employees affected and such determination shall be final and binding.

Change of Operations

Change of Operations Committee

...The Change of Operations Committee shall also have jurisdiction for a period of twelve (12) months following the opening of a new terminal to consider the redomicile of employees who are laid off as a direct result of such opening of a terminal. This Committee shall also have jurisdiction over the closing of terminals in regard to seniority...

...Change of Operations Seniority

(d) The Change of Operations Committee established herein shall have the sole authority to determine questions of the application of seniority in those situations presented to it and in connection therewith the following general rules shall apply, subject, however,

to modification as provided by Section 6(g) below:

Closing, Partial Closing of Terminals, Transfer of Work

(1) When branches, terminals, divisions or operations (hereinafter "terminal(s)") are closed or partially closed and the work of such terminal(s) is transferred, in whole or in part, to another terminal(s) the active employees (excluding those employees on letter of layoff) at the closed or partially closed terminal(s) shall have the right to bid into a master seniority roster (road or city) comprised of bidders from the active seniority rosters of closed or partially closed terminal(s) in the order of their continuous classification (road or city) seniority. Continuous classification seniority shall be defined as that seniority which the employee is currently exercising and has not been broken in the manner provided by Article 5, Section 1 or by voluntary changes in domicile not directed, approved or ordered by a Change of Operations Committee. Employees shall bid from the combined master seniority roster into openings at the terminal(s) into which work is being transferred. Employees so transferred shall be "dovetailed" into the appropriate active seniority roster at the new terminal(s) in the order of their continuous classifi-

cation seniority. Such transfers shall be permitted prior to the recall of laid off employees at such gaining terminal(s). If and when additional employees are required in excess of those who formed the combined active roster at the point of redomicile, employees on letter of layoff at that location shall be recalled. If recalled, such employees shall be "dovetailed" with their continuous classification seniority.

In addition, the inactive seniority rosters (employees who are on letter of layoff) at the terminal(s) from which employees are being redomiciled shall be "dovetailed" into a master "laid-off" seniority roster and such employees shall have the same opportunities to transfer to terminal(s) within the Area of the Supplemental Agreement which are afforded to employees covered by the provisions of subparagraph (2)b below...

Opening of Terminals

(3) When a new terminal(s) is opened (except as a replacement for existing operations or a new division in a locality where there are existing operations), the Employer shall offer to those employees, if any, affected thereby the opportunity to transfer to regular positions in the new terminal(s) in the order of

such employee's continuous classification (road or city) seniority date as defined herein. Upon arrival at such new location, such employees shall be "dovetailed" with their continuous classification (road or city) seniority date together with other employees so transferring.

This provision is not intended to cover situations where there is replacement of an existing operation or where a new division is opened in a locality where there is an existing terminal. In these latter situations, those employees laid off at the existing facilities shall have the first opportunity for employment at the new operation in accordance with their continuous classification (road or city) seniority date, and upon arrival shall be similarly "dovetailed". If all regular full-time positions are not filled in this manner, then the provisions of the preceding paragraph shall apply...

ARTICLE 45. GRIEVANCE MACHINERY AND UNION LIABILITY

The Unions and the Employers agree that there shall be no strike, lockout, tie-up or legal proceedings without first using all possible means of settlement, as provided for in this Agreement, and in the Na-

tional Agreement, if applicable, of any controversy which might arise.

Section 1. General

Disputes shall first be taken up between the Employer and the Local Union involved. Failing adjustment by these parties, the following procedure shall then apply:

(a) Where a Joint Local Area Committee, by a majority vote, settles a dispute, no appeal may be taken to the Joint State Cartage Committee. Such decisions will be final and binding on both parties.

(b) Where a Joint Local Area Committee is unable to agree or come to a decision on a case, or where there is no such committee, it shall, at the request of the Union or the Employer involved, be appealed to the Joint State Cartage Committee at the next regular constituted session. Minutes of the local committee shall set forth the position and facts relied on by each party, but each party may supplement such minutes at the hearing before the Joint State Cartage Committee.

(c) Where a Joint State Cartage Committee, by a majority vote, settles a dispute, no appeal may be taken to the Joint Area Cartage Committee. Such decision will be final and binding on both parties.

(d) Where a Joint State Cartage Committee is unable to agree or come to a decision on a case, it shall, at the request of the Union or the Employer inolved, be appealed to the Joint Area Cartage Committee at the next regular constituted session, unless the parties mutually agree to umpire handling. Matters pertaining to interpretation are not subject to umpire handling at this level. Where the Joint Area Committee, by majority vote, settles a dispute, such decision shall be final and binding on both parties with no further appeal.

(e) It is agreed that all matters pertaining to the interpretation of any provisions of this Agreement may be referred by the State Secretary for the Union or the State Secretary for the Employers at the request of either the Employer or the Union parties to the issue with notice to the other Secretary, to the Joint Area Cartage Committee at any time for final decision. At the request of the Company or Union representative, the Joint Area Cartage Committee shall be convened on seventy-two (72) hours notice to handle matters so referred.

(f) Deadlocked cases may be submitted to umpire handling if a majority of the Joint

Area Cartage Committee determine to submit such matter to an umpire for decision. Otherwise, either party shall be permitted all legal or economic recourse.

(g) Failure of any Joint Committee to meet without fault of the complaining side, refusal of either party to submit to or appear at the grievance procedure at any stage, or failure to comply with any final decision, withdraws the benefits of ARTICLE 45.

(h) The procedures set forth herein may be invoked only by the authorized Union representative or the Employer...